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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76- 119

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Petitioner,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT D. MORRISON
MORRISON, ETTIEN & BARRON
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501

COUNSEL FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Petitioner,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Distri t Court of the Twelfth Judicial District of the State of Montana, In and For the County of Blaine, and the Honorable Bernard W. Thomas, District Court Judge, Respondents, pray that the Petition For Writ Of Certiorari be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 554 P2d. 1115 (Mont. 1976), and the district court's order. (Petitioners Appendix p. 29)

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

Respondents adopt the questions presented in their petition.

STATUTES INVOLVED

Respondents adopt Petitioner's statement of involved.

STATEMENT OF THE CASE

The Respondents accept Petitioner's Statement of the Case with the following corrections and additions.

There is nothing in the pleadings or records of this case indicating that Gardipee was being transported to the Blaine County Jail for purposes of incarceration pending posting of bail bond.

Procedurally, other than the Amended Complaint, no evidence by way of discovery or otherwise has been developed or presented either to the Montana Supreme Court or before the District Court of the Twelfth Judicial District. On each of the two occasions where Petitioner filed a Petition for Writ of Supervisory Control on Other Appropriate Writ with the Montana Supreme Court, the matter was heard ex parte. Counsel for Respondents were not notified and made no appearance for oral argument. No findings of fact or conclusions of law have been made by the Montana Courts.*

---

* Order Denying Motion to Dismiss, Motion for Extension of Time to Further Plead, Motion to Dismiss, Motion to Dismiss Defendant's Second Motion to Dismiss, Order Striking Defendant's Second Motion to Dismiss, Order of May 13th, Order of June 14th, Order of May 18th, Motion to Reduce Time Within Which to Further Plead, Order of June 22nd, Default, Notice of Application for Default Judgment, Motion to Further Stay All Proceedings, Order Entering Default, Notice of Entry of Default, Answer, Motion to Set Aside Default Judgment, Affidavit

- 2 -

REASONS FOR DENYING WRIT

The Montana Court has apparently alligned itself with the Colorado Court in holding that by adopting incorporation under 25 U.S.C.A. #476 and consenting to sue and be sued in courts of competent jurisdiction within the United States, the Fort Belknap Indian Community has rendered itself amenable to the courts of the State of Montana in any action which the state courts may take cognizance. The tribe has recourse to the state courts for the protection of its own rights and is answerable in said courts to these who assert claims against it. MARTINEZ v. SOUTHERN UTE TRIBE, 374 P2d. 691 (Colo. 1962). The Colorado Court did not limit itself to simply "identified business transactions" but expressly included "any" action of which the state court may take cognizance. @ By adopting provisions in its corporate charter consenting to sue and be sued, the Nebraska Court has held a Tribe has rendered itself amenable to a quiet title action. FONTONELLE v. OMAHA TRIBE OF NEBRASKA, 430 F2d. 143 (1970)

@ "The defendant by adopting incorporation under 25 U.S.C.A. #476 and consenting to sue and be sued in courts of competent jurisdiction within the United States, has rendered itself amenable to the courts of the State of Colorado in any action of which the state courts may take cognizance. It has recourse to the state courts for the protection of its own rights and is answerable in said courts to those who assert claims against it". MARTINEZ v. SOUTHERN UTE TRIBE, (Supra.) Page 694

- 3 -

The waiver of sovereign immunity contained in the sue and be sued provisions in this corporate charter does not distinguish between the governmental and business functions of the Tribe. The only limitation is in the levy of a judgment lien or attachment. The question of satisfying any judgment which might be obtained is not at issue at this time. However, it is respondents understanding, based upon information received but which has not yet been fully confirmed, that the Tribe is fully protected from judgment by reason of it having purchased a policy of liability insurance. If this proves to be the case then the same may be considered as "specially pledged or assigned" for purpose of satisfying any such judgment.

Montana is a free, sovereign, and independent state whose citizens shall not be denied the equal protection of the laws. (Article II, Sec. 4 1972 Constitution of Montana). The Courts of Justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. (Article II, Sec. 16, 1972 Constitution of Montana). To deny Citizens of Montana recourse to its courts for torts committed by an Indian Tribe while engaged in activities outside the exterior boundaries of the reservation, would be a denial of these constitutional rights.

The right of a sovereign does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference. PEOPLE v. STREEPER, (1957) 12 Ill. 2d. 204, 145 N.E2d. 625; HALL v. UNIVERSITY OF NEVADA, (1972) 105 Cal.

-4-

Rptr. 355, 503 P2d. 1363.

An Indian Tribe which engages in activities outside the reservation but within Montana, should be subject to the laws of the State of Montana with respect to those activities and a proper party to suit in the Montana Courts. When the Fort Belknap Indian Community enters into activities, outside the reservation and within the State of Montana, it is not exercising sovereign power over the citizens of this State and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless Montana has conferred immunity by law as a matter of comity, which it has not done.

CONCLUSION

The Petition for a Writ of Certiorari should be denied for the following reasons:

1. By adopting a provision in its corporate charter consenting to sue and be sued, the Petitioner has rendered itself amenable to the jurisdiction of the Courts of Montana for torts committed by its agents off the reservation.

2. The Petitioner does not have sovereign immunity from a suit for torts committed by its agents off the reservation.

Respectfully submitted,

ROBERT D. MORRISON
MORRISON, ETTIEN & BARRON
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501

COUNSEL FOR RESPONDENTS

-5-

-5-

APPENDIX

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendants.

No. 7201

FILED

FEB 20 1976

CLERK OF DISTRICT COURT

BY _____ DEPUTY CLERK

ORDER DENYING MOTION TO DISMISS

Defendant's motion to dismiss plaintiff's complaint on the ground that the Court lacks jurisdiction of the subject matter of the action and of the defendant, has been submitted to the Court on the briefs of counsel. Now, it appearing to the Court that (1) the action is based on acts alleged to have occurred outside the exterior boundaries of the Fort Belknap Indian Reservation, and (2) although defendant may have immunity from suit, it has waived such immunity in its corporate charter, (without consenting to the levy of any judgment, lien or attachment upon the property of the community other than income or chattels specifically pledged or assigned.) the Court concludes that it has jurisdiction of the subject matter of the action and of defendant, subject to the limitations expressed in the charter.

It is, therefore, hereby ORDERED that the motion to dismiss be and it is hereby denied. Defendant is allowed twenty (20) days from this date in which to further plead.

DATED this ~~20th~~ 23rd day of February, 1976.

R. H. Henry

Judge of the District Court

STATE PUBLISHING CO. HELENA, MONT.

Blank No. 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FT. BELKNAP INDIAN COMMUNITY

Defendant

Affidavit of Mailing

STATE OF MONTANA, County of Blaine } ss.

Eleanor Felton, being duly sworn, say that she is Clerk of said Court; that on the 23d day of February 19 76, she mailed, with the proper postage prepaid thereon, correct and true copies of

Order Denying Motion to Dismiss

in the above entitled case and addressed to:

Philip E. Roy, P. O. Box 849, Browning, Mt. 59417;

Morrison, Ettien & Barron, Attys at Law, Havre, Montana 59501

Eleanor Felton

Subscribed and sworn to before me this 23d day of February A.D. 19 76

Esther Dougherty

Notary Public for the State of Montana
Residing at Chinook, Mt.
My Commission expires Jan. 25, 1979

STATE PUBLISHING CO. HELENA, MONT

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * *

NO. 7301

FILED
MAR 9 1976
Eleanor Felton
CLERK OF DISTRICT COURT
BY
DEPUTY CLERK

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendants.

No. 7301

MOTION FOR EXTENSION OF TIME TO FURTHER PLEAD

* * * * * * * * * * * *

COMES NOW, the Defendant, the Fort Belknap Indian Community, above named and moves the Court for an extension of twenty (20) days from March 15, 1976 within which to further plead this matter. This Motion is made on the grounds that additional time is required by Defendant to properly research the matter in light of the fact that the Court had denied the Defendants, Fort Belknap Indian Community, Motion to Dismiss based on the lack of jurisdiction of the subject matter and the Defendant.

Dated this 4th day of March, 1976.

Philip E. Roy

PHILIP E. ROY, Attorney for Defendants
Fort Belknap Indian Community
P. O. Box 849
Browning, Montana 59417

ORDER

Upon reading and filing the foregoing Motion of Defendants, and good cause appearing therefore, it is ordered that the Defendants, may have until and including the 4th day of April, 1976, within which to plead.

M-5 J-158

B.W. Thomas

HONORABLE B.W. THOMAS, Judge of the District Court
Twelfth Judicial District

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * * * *

FILED APR 7301
Eleanor Felton
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE,

Plaintiff,

vs.

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

MOTION TO DISMISS

* * * * * * * * * * * * * *

COMES NOW the defendant, the Fort Belknap Indian Community and moves to dismiss the Amended Complaint of Plaintiff on file herein on the following grounds:

That the Amended Complaint fails to state a claim against defendant upon which relief can be granted.

DATED this 2nd day of April, 1976.

Philip E. Roy

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Montana 59417

CERTIFICATION OF MAILING

I, PHILIP E. ROY, Attorney for Defendant, do hereby certify that I mailed a full and true copy of the within Motion to Dismiss at Browning, Montana, on the 2nd day of April, 1976, directed to the following:

Morrision, Ettien & Barrow
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501

Attorneys for Plaintiff.

Philip E. Roy

PHILIP E. ROY, Attorney at Law
Attorney for Defendant

STATE PUBLISHING CO. HELENA, MONT

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * * * * * * * * * * *

FILED APR 7301
Eleanor Felton
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE, : No. 7301

Plaintiff, :

-v- : MOTION TO DISMISS

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, : DEFENDANT'S SECOND MOTION TO DISMISS

Defendant. :

* * * * * * * * * * * * * * * * * * * *

COMES NOW, the aboye plaintiff and moves this Court for an order dismissing the Motion to Dismiss filed by defendant on the 2nd day of April, 1976, for the reasons and upon the grounds that all of the issues raised by defendant in his motion and brief were considered by this Court previously in entering its Order Denying Motion to Dismiss dated the 23rd day of February, 1976. That said Motion to Dismiss is frivolous, sham and redundant and defendant is therefore in default for failure to further plead as previously ordered by this Court.

DATED This 16th day of April, 1976.

MORRISON, ETTIEN & BARRON
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This 16th day of April 76

By

339 Third Street, Havre, Montana 59501

MORRISON, ETTIEN & BARRON
ATTORNEYS AT LAW
339 THIRD STREET
P.O. BOX 1070
HAVRE, MONTANA 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

ORDER STRIKING DEFENDANT'S SECOND MOTION TO DISMISS

Since it appears that defendant's second motion to dismiss plaintiff's amended complaint raises the same issue as that raised by its first motion and is therefore redundant and subject to a motion to strike, plaintiff's motion to dismiss defendant's second motion is deemed a motion to strike and is granted.

It is, therefore, hereby ORDERED that defendant's second motion to dismiss be and it is hereby stricken and defendant is allowed fifteen (15) days from this date in which to plead to the amended complaint.

DATED this 28th day of April, 1976.

B. W. Thomas

Judge of the District Court

M-5 p.166

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

O R D E R

Upon oral application of Philip E. Roy, Attorney at Law, Attorney for Fort Belknap Indian Community, the Court having been advised that Defendant Tribes on the 12th day of May, 1976, filed with the Supreme Court of the State of Montana, its Petition and Application for a Writ of Supervisory Control, requesting that the Supreme Court of the State of Montana grant appropriate relief as to the jurisdiction of the State District Court, and further cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Fort Belknap Indian Community, is hereby granted thirty (30) days from and after the 13th day of May, 1976 in which to further plead, or until such time as the Supreme Court of the State of Montana renders a final opinion as to the jurisdiction of the State District Court.

DATED this 14th day of May, 1976.

B. W. Thomas

HONORABLE BERNARD W. THOMAS
District Judge
Twelfth Judicial District

NO. 7301
FILED
Eleanor Zelton
CLERK OF DISTRICT COURT
BY ..... DEPUTY CLERK

M-5 p.168

STATE PUBLISHING CO. HELENA, MONT.

Blank No. 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FT. BELKNAP INDIAN COMMUNITY

Defendant

Affidavit of Mailing

STATE OF MONTANA, }
County of Blaine } ss.

Eleanor Felton, being duly sworn, say that she is Clerk of said Court; that on the 14th day of May 19 76 she mailed, with the proper postage prepaid thereon, correct and true copies of Order in the above entitled case and addressed to:

Philip E. Roy, Box 849, Browning, Mt. 59417;

Morrison, Ettien & Barron, Attorneys at Law, Havre, Mt. 59501

Eleanor Felton

Subscribed and sworn to before me this 14th day of May, A.D. 19 76.

Esther Dougherty
NOTARY PUBLIC for the State of Montana
Residing at Chinook, Mt.
My Commission expires Jan. 25, 1979.

Entered 7301

Entered accordingly

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,
Plaintiff,
-vs-
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,
Defendant.

No. 7301

ORDER

Upon oral application of Philip E. Roy, Attorney at Law, Attorney for Fort Belknap Indian Community, the Court having been advised that Defendant Tribes on the 11th day of June, 1976, filed with the Supreme Court of the State of Montana, its Petition and Application for Writ of Supervisory Control, requesting that the Supreme Court of the State of Montana grant appropriate relief as to the jurisdiction of the State District Court, and further cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Fort Belknap Indian Community, is hereby granted thirty (30) days from and after the 14th day of June, 1976 in which to further plead, or until such time as the Supreme Court of the State of Montana renders a final opinion as to the jurisdiction of the State District Court.

DATED this 14th day of June, 1976.

HONORABLE BERNARD W. THOMAS
District Judge
Twelfth Judicial District

STATE PUBLISHING CO. HELENA, MONT.

14-5-1771

Blank No 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant

Affidavit of Mailing

STATE OF MONTANA, County of Blaine } ss.

Esther Dougherty, being duly sworn, says that she is Deputy Clerk of said Court; that on the 14th day of June 1975 she mailed, with the proper postage prepaid thereon, correct and true copies of an Order in the above entitled case and addressed to: Philip E. Roy, Box 349, Browning, Mt. 59417 Morrison, Ettien & Barron, Attorneys at Law, Havre, Mt. 59501

Esther Dougherty

Subscribed and sworn to before me this 14th day of June A.D. 19 76

Notary Public for the State of Montana
Residing at Chinook, Montana
My Commission expires 1-6-78

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13374

THE STATE OF MONTANA ex rel. THE FORT BELKNAP INDIAN COMMUNITY of THE FORT BELKNAP INDIAN RESERVATION, MONTANA,

Relator,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, In and For the County of Blaine and the HONORABLE BERNARD W. THOMAS,

Respondents.

ORDER

PER CURIAM:

After hearing the matter ex parte, it appears that there are relevant factual disputes that cannot be resolved by this Court and thus supervisory control is not proper. Accordingly the petition is denied without prejudice.

DATED this 18th day of May, 1976.

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

NO. 7301

FILED
JUN 17 1976
Eleanor Sabol
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE, Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.

NO. 7301

MOTION TO REDUCE TIME WITHIN WHICH TO FURTHER PLEAD

COMES NOW, the above defendant and moves this Court for an Order reducing the time in which defendant shall further plead in this matter for the following reasons:

That defendant has heretofore petitioned the Montana Supreme Court for a Writ of Supervisory Control or other appropriate writ. By its Order dated the 18th of May, 1976, a copy of which is attached hereto, the Montana Supreme Court entered its Order denying said petition.

That there are no matters presently before the Supreme Court and defendant's continuing requests for additional time to further plead are designed to delay this matter and to prevent an early and expeditious resolution of the issues presented by plaintiff's Complaint.

WHEREFORE, plaintiff respectfully requests this Court to reduce the time within which defendant shall further plead.

DATED this 16 day of June, 1976.

MORRISON, ETTIEN & BARRON

339 Third Street
P.O. Box 1070
Havre, Montana 59501

ATTORNEYS FOR PLAINTIFF

MORRISON, ETTIEN & BARRON
ATTORNEYS AT LAW
339 THIRD STREET
P.O. BOX 1070
HAVRE, MONTANA 59501

CERTIFICATE OF MAILING

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address this 16 day of June, 1976.

MORRISON, ETTIEN & BARRON

By _____

339 Third Street, Havre, Montana 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * *

JAMES W. CARDIPEE,

Plaintiff,)

vs.)

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.)

No. 7301

O R D E R

* * * *

Plaintiff having filed his motion to reduce the time within which defendant must plead to plaintiff's complaint, and good cause appearing therefor,

It is hereby ORDERED that the Order of this Court dated June 14, 1976, be and it is hereby modified to allow defendant until July 6th, 1976, or until five (5) days after the Supreme Court of Montana disposes of defendant's second application for a writ of supervisory control, whichever date is earlier, within which to further plead to plaintiff's complaint.

Dated this 22d day of June, 1976.

B W Thomas

Judge of the District Cort

cc Roy
Morrison

NO. 7301
FILED
JUN 22 1976
Eleanor Zelton
CLERK OF DISTRICT COURT
BY _____ DEPUTY CLERK

M-5-p 171

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : NO. 7031

Plaintiff, :

-vs- : DEFAULT

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA. :

Defendant. :

* *

FILED

In this action the Defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, having been regularly served with process, and having failed to appear and further plead by July 6, 1976, as previously ordered by this Court by its Order dated June 22, 1976, the default of said Defendant in the premises is hereby duly entered according to law.

ATTEST, my hand and the Seal of said Court this 14th day of September, 1976.

CLERK OF THE DISTRICT COURT

Yvonne Gilbert

DEPUTY CLERK

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : NO. 7301

Plaintiff, :

-vs- :

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, : NOTICE OF APPLICATION FOR DEFAULT JUDGMENT

Defendant. :

* *

FILED

TO: FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA AND TO PHILIP E. ROY, ITS ATTORNEY

PLEASE TAKE NOTICE That on September 28, 1976, at 10:00 o'clock A.M. or as soon thereafter as counsel can be heard, the undersigned will make application to the Court in the above-entitled action for Judgment as prayed for in plaintiff's Complaint.

This application will be made on the grounds that you are in default in that you have failed to appear and further plead by July 6, 1976, as previously ordered by this Court by its Order dated June 22, 1976, and that applicant is entitled to Judgment against you as prayed for.

DATED this 13th day of September, 1976.

MORRISON, ETTIEN & BARRON

Attorneys at Law
339 Third Street
P.O. Box 1070
Havre, Montana 59501

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address this 13th day of September 1976

MORRISON, ETTIEN & BARRON

By

339 Third Street, Havre, Montana 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, Plaintiff,	)	No. 7301
-vs-	)	MOTION TO FURTHER STAY
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	)	ALL PROCEEDINGS

* *

COMES NOW, the Defedant, The Fort Belknap Indian Community of the Fort Belknap Indian Reservation and moves the above-entitled Court to further stay all proceedings pending an Order from the Montana Supreme Court on Defendant's application for presentation of a Writ of Supervisory Control or other appropriate writ to be set by the Montana Supreme Court.

DATED this 14th day of September, 1976.

PHILLIP E. ROY, Attorney at Law
Attorney for Defendants
P.O. Box 849
Browning, Montana 59417

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, Plaintiff,	:	No. 7031
-v-	:	ORDER ENTERING DEFAULT
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	:	

* *

This matter having come on for hearing on the 28th day of September, 1976, by reason of plaintiff's Notice of Application for Default Judgment, the plaintiff appearing through his attorney Robert D. Morrison, Esq., the defendant not appearing either in person or through its attorney of record. It further appearing to the Court that defendant was regularly served with a copy of such notice and did not appear in response thereto and has therefore made no objection to or shown any just cause why its default should not be entered herein and plaintiff granted the relief prayed for in his Complaint; and the Court being fully advised in the premises and good cause appearing:

IT IS HEREBY ORDERED That defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, be, and it hereby is, adjudged to be in default in this action, and that such default shall be entered forthwith.

IT IS FURTHER ORDERED That plaintiff shall have judgment against defendant on the Complaint for such sum as shall be determined and found as damages in proceedings before this Court and jury to be held on a date to be fixed by this Court.

DATED This 28th day of September, 1976.

Judge

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : No. 7031

Plaintiff, :

-v- : NOTICE OF ENTRY OF DEFAULT

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, :

Defendant. :

* *

TO: PHILIP E. ROY, Attorney for the above-named defendant:

You are hereby notified that on the 28th day of September, 1976, judgment by default was entered against defendant in the above entitled action and in favor of the above-named plaintiff.

DATED This 28th day of September, 1976.

Clerk of the District Court

By _____
Deputy Clerk

Copy mailed to Philip E. Roy
October 19th, 1976.

P. O. Box 849
Browning, Montana 59417

CERTIFICATE OF MAILING

I, PHILIP E. ROY, hereby certify that on the 8th day of November, 1976, I deposited in the Post Office at Browning, Montana, in an envelope securely sealed with postage thereon prepaid and addressed to:

Robert D. Morrison
Attorney at Law
339 Third Street
Havre, Mt. 59501

a true and correct copy of the foregoing Answer in the above entitled action.

PHILIP E. ROY
Attorney for Defendant

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	No. 7301

A N S W E R

COMES NOW the Defendant, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, and for its answer to Plaintiff's Complaint on file herein, hereby admits, denies and alleges as follows:

I.

Defendant denies each and every allegation, matter and thing contained in Plaintiff's Complaint on file herein.

II.

Defendant makes this answer to Plaintiff's Complaint, on file herein, as a special appearance and only for the purpose of excepting to the jurisdiction of the State District Court and Defendant expressly reserves the right to object at any and all times to the jurisdiction of the District Court of the Twelfth Judicial District, in and for the County of Blaine.

WHEREFORE, Defendant prays:

1) That the Plaintiff's Complaint be dismissed.

2) For costs and disbursements by Defendant.

3) For such other and further relief as that this Court may deem just and equitable.

DATED this 8th day of November, 1976.

PHILIP E. ROY, Attorney for Defendant

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Defendant.	No. 7301 MOTION TO SET ASIDE DEFAULT JUDGMENT

COMES NOW the Defendant, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation and files this Motion with this Honorable Court to set aside the default judgment which was filed on the 19th day of October, 1976 against the Defendant for the reasons contained in Defendant's Counsel's accompanying affidavit.

DATED this 12th day of January, 1977.

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Mt. 59417

ACKNOWLEDGEMENT OF SERVICE

I HEREBY CERTIFY that I was served with a true and correct copy of the foreoing "Motion to Set Aside Default Judgment" in the above-entitled action on this 12th day of January, 1977 by Defendant's Counsel.

ROBERT D. MORRISION
Attorney for Plaintiff
P. O. Box 1070
Havre, Mt. 59501

Court to stay all proceedings on the 14th day of September, 1976, pending their Petition for Writ of Certiorari to the United States Supreme Court, which was never acted upon by this Court.

6. That Defendant has not been using delaying tactics but has been moving diligently on its Petition for Writ of Certiorari to the United States Supreme Court.

7. That notwithstanding the jurisdictional issue involved in this case; the case should be heard on its merits because there are certainly controversial issues as to liability which can only be resolved in full litigation.

8. That Defendant has moved within a reasonable time pursuant to Rule 60(b)(6) Montana Rules of Civil Procedure to set aside the default judgment after exhausting all efforts with Plaintiff's Counsel to set aside the default judgment.

DATED this 12th day of January, 1977.

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Mt. 59417

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that I was served with a true and correct copy of the foregoing "Affidavit" in the above entitled action on this 12th day of January, 1977, by Defendant's Counsel.

ROBERT D. MORRISON, Attorney at Law
Attorney for Plaintiff
P. O. Box 1070
Havre, Mt. 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Defendant.	No. 7301 AFFIDAVIT

FILED

COMES NOW Defendant's Counsel, Philip E. Roy, and files this Affidavit in support of Defendant's Motion to Set Aside the Default Judgment filed against the Defendant on October 19, 1976 for the following reasons:

1. That Defendant was not being dilitory but was adamantly contesting the issue of jurisdiction in the Montana State Supreme Court on a Petition for Writ of Supervisory Control.

2. That Defendant received on the 11th day of June, 1976, thirty (30) days from and after the 14th day of June, 1976, within which to further plead or until such time as the Montana Supreme Court renders a final determination.

3. That Plaintiff filed a Motion to Reduce the Time in which Defendant could plead; and the time was reduced until the 6th day of July, 1976, or until five (5) days after the Montana State Supreme Court disposes of the matter. However, the Order indicated "whichever date is earlier". Since Defendant has no control over the calendar it was assumed that this was to mean whichever date is later.

4. That Defendant had been attempting to stipulate with Plaintiff's Counsel in which the default was to be set aside, however, the answer which Defendant submitted was not satisfactory to Plaintiff's Counsel.

5. That Defendant made a motion to the State District

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Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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REPLY BRIEF OF PETITIONER

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Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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REPLY BRIEF OF PETITIONER

This reply brief is submitted pursuant to Rule 24(4) of the Supreme Court Rules, in response to the Memorandum for the United States as Amicus Curiae filed in May, 1977.

I.

The United States, while agreeing with the Fort Belknap Indian Community on the merits [Mem. p. 6,

n.9], concludes nevertheless that the Community's Petition for Writ of Certiorari should not be granted at this time, because in its view the decision of the Supreme Court of Montana rendered without opinion could have been based upon an adequate and independent non-federal ground. We respectfully disagree with the United States' conclusion that this Court lacks jurisdiction to grant our Petition for the following reasons:

A. The United States relies on *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1951), to support its view that where the highest court of the state renders no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction. But, *Stembridge* v. *Georgia* involved a case where the federal question was not properly raised pursuant to state procedures before the highest state court. However, where, as in the present case, exclusively federal questions have been timely and properly raised before the highest state court, and the highest court renders an adverse decision without an opinion, this Court has found jurisdiction to review the case. *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 254-258 (1957). *See also, Cicenia* v. *LaGay,* 357 U.S. 504, n.2 (1958).

B. The United States relies on *State ex rel. Kosena* v. *District Court,* 560 P.2d 522 (Mont. 1977), to support its view that the Montana Supreme Court may have refused to issue its writ because it found no "extraordinary and compelling circumstances" to justify interrupting the normal trial and appeal process. But, the "extraordinary and compelling circumstances" rule was established by the Montana Supreme Court where relief was sought from a district court's denial of a motion for summary judgment. A different rule operates where the relief sought deals with the district court's jurisdiction, *State ex rel. Amsterdam Lumber Inc.* v. *District Court,* 516 P.2d 378 (Mont. 1973), or where the relief sought deals solely with a question of law whose early resolution would eliminate expensive and needless litigation. *Walker* v. *Tschache,* 510 P.2d 9 (Mont. 1973); *State Highway Commission* v. *District Court,* 499 P.2d 1228 (Mont. 1972). In such circumstances the Montana Supreme Court has regularly entertained requests for supervisory control.

C. If the Montana Supreme Court relied on state procedural grounds for its denial as is suggested by the United States, why did it deny petitioner's first request for supervisory control and request clarification as to whether the alleged tortious conduct of the tribal police officer occurred on or off the Fort Belknap Indian Reservation [Pet. p. 8]? If the Montana Supreme Court concluded that extraordinary relief was not appropriate under state procedures it would have indicated so initially rather than seeking clarification of certain facts which relate solely to the federal jurisdictional issues raised by the Fort Belknap Indian Community.

D. We are disturbed by the speculation of the United States that the Montana Supreme Court may have refused to issue its writ because of the existence of a factual question as to whether the Fort Belknap Indian Community's police force operates pursuant to corporate rather than governmental powers [Mem. p. 6]. No such factual question exists. Article V, Section 1(i) of the Tribe's 1935 Constitution expressly authorizes the establishment of law enforcement ordinances. The Community's Corporate Charter omits any reference to law enforcement.

E. We question the United States' often-stated concern for a more suitable record in a case challenging the sovereign immunity of an Indian tribe in a state court. Whatever factual record that may be developed through a trial will not add or take away from the fundamental federal question of sovereign immunity which has been properly raised by the Fort Belknap Indian Community. Moreover, the underlying purpose for sovereign immunity, to protect the sovereign from unconsented suit, wil' be seriously compromised if a Montana Indian tribe is forced to defend itself in a protracted state court proceeding, particularly where the United States, acting as trustee, agrees with the Tribe that congressional consent is lacking.

II.

Review of the scope of the waiver of sovereign immunity contained in the Indian Reorganization Act, Act of June 18, 1934, should not be postponed by this Court, because this Court has recently agreed to review the scope of the waiver of soverign immunity contained in the Indian Civil Rights Act, Act of April 11, 1968. *Santa Clara Pueblo* v. *Martinez,* 540 F.2d 1039 (10 Cir. 1976), *cert. granted,* 45 U.S.L.W. 3745 (May 16, 1977). These two Acts are the only congressional expressions relating to a waiver of the sovereign immunity of Indian tribes. They should be considered together.

For the above reasons petitioner submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Boulder, Colorado 80302

Counsel for Petitioner

June, 1977